No. 90-1

AUG 13 1990
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF LITTLE ROCK, *et al.*,

Petitioners,

v.

REATHER REYNOLDS, as Administratrix of the Estate of John Willie Reeves, deceased, and in her own behalf,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF IN OPPOSITION

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City of Little Rock, et al.,
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v.

Reather Reynolds, as Administratrix of the Estate of John Willie Reeves, deceased, and in her own behalf,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Petitioner in this case asks the Court to consider the application of *Batson v. Kentucky*, 476 U.S. 79 (1986), in the context of civil litigation, where, as here, a state defendant has used its

peremptory challenges to strike the only African Americans on the venire.

The United States Court of Appeals for the Eighth Circuit unanimously held that "a state actor may not exercise peremptory challenges with the intent to exclude black people from the jury, whether in a criminal or a civil trial". *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990), App. 2[1]. The petitioner seeks review of this holding, asserting that the panel's judgment was in error.

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[1] The text of the Court of Appeals decision is reproduced in the Appendix of the Petition For Writ of Certiorari.

ARGUMENT

Reasons For Denying The Writ

I.

THE DECISION OF THE EIGHTH CIRCUIT NARROWLY APPLIES THIS COURT'S DECISION IN *BATSON*, AND PRESENTS NO CONFLICT WITH THE DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS

The Petition of the City of Little Rock, et al., presents only one substantive reason supporting their Petition for Writ of Certiorari, to wit, their assertion of a conflict between the decisions of the Eighth Circuit below, and the Fifth Circuit in *Edmonson v. Leesville Concrete Co*, 895 F.2d 218 (5th Cir. 1990).

However, unlike the decision of the Fifth Circuit in *Edmonson*, or the decision of the Eleventh Circuit in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), *cert. denied sub. nom Tiller v. Fludd*, 110 S.Ct.

201 (1989), the decision of the Eighth Circuit does not attempt to extend the holding of *Batson* to all civil litigation, regardless of the parties. Rather, the narrow issue decided by the Eighth Circuit in this case is that "a state actor may not exercise peremptory challenges with the intent to exclude black people from the jury, whether in a criminal or a civil trial". *Reynolds v. City of Little Rock*, App. 2. Here the Court of Appeals specifically concluded that "*Batson* applies to the conduct of a governmental litigant in a civil trial". *id.*

> The more natural reading of *Batson* is that its rule of non-discrimination applies only to governmental actors, without distinguishing criminal and civil legal proceedings.

Reynolds v. City of Little Rock, App. 10.

Indeed the Court of Appeals underscored this view by specifically noting its

refusal to consider the situation, now posed by the petitioner, which was not presented by the facts before it, and was rejected by the *en banc* court in *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308 (5th Cir. 1988), *vacated by order granting rehearing en banc*, 860 F.2d 1317 (5th Cir. 1989), *trial court affirmed en banc*, 895 F.2d 218 (5th Cir. 1990):

> . . . We express no view on whether the action of the court alone, in a case involving no governmental litigants, can supply the necessary element of governmental action.

Reynolds v. City of Little Rock, App. 10.

Contrary to the assertions of the Petitioner, the Court of Appeals decision below presents no conflict with either *Edmonson* or *Fludd*. In *Edmonson*, the Court of Appeals specifically refrained from considering the issue decided by the

Eighth Circuit here:

> We have no occasion to consider the situation presented where the state appears as a civil litigant.

Edmonson v. Leesville Concrete Co., Inc, 895 F.2d 218, 222 n.10.

As reiterated by the *en banc* panel, the essence of the Fifth Circuit's opinion is the complete lack of a governmental actor, thus *Edmonson* plainly stated the issue as:

> "[W]hether the exercise of peremptory challenges by a private litigant in a civil action pending in federal court is a government action, to which the Fifth Amendment applies, or a private action, which the Constitution does not reach." 860 F.2d at 1310. The answer to it is dispositive of the appeal; for if governmental action is not present, then the courts hold no warrant to interfere, in the name of equal protection, with the system of civil peremptory challenges.

Edmonson, 895 F.2d at 220.

Likewise, while *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), arguably

involves state actors as litigants[2], the decision in the case was plainly not premised on the status of the litigants. Rather the essence of Judge Tjoflat's opinion for the Eleventh Circuit was that it is the action of the trial court that constitutes the state action which makes the Equal Protection clause, and therefore *Batson*, applicable to civil litigation.

> When blacks are excluded from jury service on account of their race, the Supreme Court has long recognized that the discriminatory actor is the trial court - even when the decision to exclude blacks may have originated in another state entity, such as the legislature.

Fludd, 863 F.2d at 828. Citing *Strauder v. West Virginia*, 100 U.S. 303, 312, 25 L.Ed. 664 (1879); *Virginia v. Rives*, 100 U.S. 313, 322, 25 L.Ed. 667 (1879); *Neal*

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[2] The defendants in the lawsuit were a police officer and his supervisor, the Sheriff of Richmond County, Georgia.

v. Delaware, 103 U.S. 370, 394, 397, 26 L.Ed. 567 (1880); and *Ex parte Virginia*, 100 U.S. 339, 347 25 L.Ed. 676 (1879), "A state acts by its legislative, its executive, *or its judicial authorities*". (Emphasis added)

II.

THE DECISION OF THE EIGHTH CIRCUIT IS A CONSISTENT AND REASONABLE APPLICATION OF THIS COURT'S HOLDINGS APPLYING THE EQUAL PROTECTION CLAUSE TO DISCRIMINATORY JURY SELECTION

The essence of the Petitioners' argument is the assertion that "critical distinctions between civil and criminal trials" prevent the extension of the *Batson* rule to civil litigation. This assertion is not only without merit, but is contradicted by prior holdings of this Court, and was directly and reasonably

addressed by the unanimous panel below.

> We find this distinction unpersuasive. It is certainly true that *Batson* was a criminal case governed by the Sixth Amendment. However, the Court explicitly declined to discuss the merits of Batson's Sixth Amendment arguments, and instead focused exclusively on the application of equal-protection principles. 476 U.S. at 84-85 n.4. Unlike the Sixth Amendment, the Equal Protection Clause of the Fourteenth Amendment does not contain any latent distinctions between criminal and civil legal process.

Reynolds v. City of Little Rock, App. 9.

The panel likewise rejected the Petitioners' assertion that the unique circumstances of the criminal defendant justifies a limitation on the application of *Batson*. Rather, relying on this Court's holdings in *Strauder v. West Virginia*, 100 U.S. 303 (1880), and *Carter v. Jury Commission of Green County*, 396 U.S. 320 (1970), the Eighth Circuit observed that these cases stress that the

private parties are not the only victims of racial discrimination on juries. *Reynolds v. City of Little Rock*, App. 11-12.

> These considerations apply as much in a civil suit against a governmental entity as to a government prosecution of an individual. In this case, a jury has had to arrive at a judgment in a traumatic episode of a police shooting of a disturbed black man. The community - particularly the black community - has an interest in ensuring that the government has not purposely excluded black people from the jury, as much as though Willie Reeves had survived the event and now stood trial for the crime of assault. We conclude that the City Attorney did have an obligation to justify his use of peremptories in this civil case.

id. See also, *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross section of the community.")

While noting *Batson's* holding that '"[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson,* 476 U.S. at 87',[3] the Eighth Circuit, nevertheless only narrowly extended the reach of that decision. Refusing to apply *Batson* to all civil litigation, regardless of the circumstances and regardless of the parties, the Eighth Circuit's holding is a consistent and reasonable application of this Court's holdings on the application of Equal Protection principles to the issue of racially motivated exclusion of African Americans from service on juries.

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[3] *Reynolds*, App. 12,

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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